IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & ODEK, JJ.A)

CRIMINAL APPEAL NO. 15 OF 2015

BETWEEN

REUBEN LUKURU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kakamega

(S. Chitembwe, J), dated 5th February, 2013

in

HCCRA No. 149 of 2011)

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JUDGMENT OF THE COURT

The appellant, **Reuben Lukuru**, was arrested and arraigned before the Chief Magistrate's Court at Kakamega on 25th October, 2010 on a charge of defilement, contrary to **section 8(1) (2)** of the **Sexual Offences Act No. 3 of 2006** (the Act). The particulars of the charge were that;

> ***"On 22nd day of October 2010 at [Particulars Withheld] village, in Central Kakamega district within western province, unlawfully and intentionally inserted his genital organ namely penis into the genital organ namely vagina of LK a girl aged five and a half years."***

The prosecution preferred an alternative charge against the appellant of an indecent act with a child contrary to **section 11(1)** of the **Act** particularized that;

> ***"On 22nd day of October 2010 at [Particulars Withheld] village, in Central Kakamega district within western province, unlawfully and intentionally contacted his genital organ namely penis into the genital organ namely vagina of LK a girl aged five and a half years."***

The appellant denied the charges leading to a trial in which the prosecution called 5 witnesses in support of its case. At the end of the trial, the magistrate found the appellant had a case to answer and placed him on his defence. On 5th May 2011, the appellant gave an unsworn statement without calling any witnesses.

The magistrate (P.O Ooko, RM) evaluated the evidence tendered before the court and found the appellant guilty as charged on the main count. He then sentenced him to life imprisonment.

Aggrieved by the conviction and sentence, the appellant appealed to the High Court. Chitembwe, J. by a judgment delivered on 5th February, 2013 dismissed the appeal for lacking in merit.

The appellant was obviously disgruntled by the holding of the High Court and preferred the instant appeal. He raised 4 grounds of appeal in

which he grumbled that the learned judge erred in law and fact by;

a) Failing to re-evaluate and re-analyse the evidence on record which was not beyond a reasonable (sic).

b) Affirming the conviction without considering the appellant's defence that was not given due consideration during the trial.

c) Failing to appreciate that the appellant was not accorded a fair trial.

During the hearing of the appeal, the appellant appeared in person while the respondent was represented by **Mr. Kakoi**, the learned Principal Prosecution Counsel. The appellant had filed written submissions while **Mr. Kakoi** made oral submissions.

In his submissions, the appellant contended that the lower courts failed to accord him a fair trial based on **Article 50** of the Constitution by not furnishing him with witness statements to enable him prepare a proper defence; upholding the identification parade which was not conducted according to the law; failing to conduct a DNA test to ascertain his guilt and by failing to consider his alibi defence.

Mr. Kakoi opposed the appeal and maintained that the appellant was rightly convicted. He further urged that all the ingredients of the offence were proved and that the complainant knew the appellant by name, even though she did not report him by name to her mother.

As this is a second appeal, we are consciously aware that our jurisdiction is confined to consideration of questions of law only by dint of **section 361(a)** of the **Criminal Procedure Code**, **Cap 75** Laws of Kenya. In **SAMUEL WARUI KARIMI V REPUBLIC [2016] eKLR** this Court affirmed this position;

> ***"This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."***

We acknowledge the first appellate court's mandate of re-analysing and re-evaluating and will therefore only interfere with its holding if it is apparent that it did not discharge that duty or no evidence. This was emphasized in **JOSEPH NJUGUNA MWAURA & 2 OTHERS V REPUBLIC [2013] eKLR**;

> ***"It is commonplace that the first appellate court is mandated to reconsider and re-evaluate the evidence on record, bearing in mind that it did not see or hear the witnesses, before making a determination of its own. See Okeno v R [1972] EA. 32, Mohamed Rama Alfani & 2 Others Vs Republic, Criminal Appeal No. 223 of 2002. Failure to properly re-evaluate the evidence on record would be a serious omission on the part of the first appellate court, and may warrant interference by this Court."***

From the memorandum of appeal, the critical issues we have distilled for determination is whether the appellant was accorded a fair trial as enshrined in **Article 50** of the Constitution and whether the identification of the appellant was free from error. We have deciphered from the judgment that the learned Judge affirmed the holding of the trial magistrate as pertains to the identification of the appellant and stated;

> ***"The trial court concluded that the appellant was properly identified by the complainant while defiling her (page 22 of the proceedings). The conviction is therefore not based on the identification of the appellant at the parade but on the fact that the complainant knew the appellant."***

As a preliminary issue we ought to examine the testimony of the complainant (PW2) on the issue of identification which was as follows;

> ***"I know the accused he is called Lukuru. I know the accused since he used to pass through the road next to our home….I told my mother that it is the accused who defiled me. After being treated I identified the accused person in an identification parade which was done locally home."***

Deducing from the above, it is clear that the trial magistrate was convinced by the foregoing testimony that PW2 identified the appellant by recognition and the same was affirmed by the learned judge hence the justification that the identification parade was of no consequence in the proceedings. The trial magistrate further asserted that since the crime was committed during the day, PW2 was able to properly identify the appellant since she was familiar with him. The learned judge affirmed this assertion in his judgment when he held that;

> ***"From the prosecution evidence PW2 knew the appellant. It is her evidence that the appellant used to pass through their home and she knew him. She referred to the appellant as Lukuru. The charge sheet gives the appellant's name as REUBEN LIKURU. It is PW2's evidence that she informed her mother that it was the appellant who had defiled her. PW4 did not confirm in her evidence that the complainant informed her that she knew the person who had defiled her. The P3 form does indicate that the complainant gave her history of having been defiled by a person known to her."***

The testimony of PW4 referred to by the learned judge concerning the identity of the appellant was as follows;

> ***"I then asked her what happened and it is now when she told me that she had been defiled. I then went back with her passed by Kakamega police station. Where I was issued with a P-3 form which was duly filled by the doctor (exhibit P-1). After two days PW1 had a stomach ache and the same also just got swollen. I then took her to Kakamega Provincial General Hospital where she was further treated as per exhibit P-3.Since the complainant said she knew who defiled her, the village elder brought about seven***

boys who were paraded and the complainant positively identified him as her defiler four times amongst the seven people."

On cross-examination, PW2 stated;

> ***"It is your wife who told me that you had defiled my daughter. My daughter approached you amongst the seven people in an identification parade which the village elder conducted."***

On re-examination she however changed her story to;

> ***"It is my child whom I was referring to as the accused's wife during cross examination that told us having been defiled by the accused."***

We need to first satisfy ourselves on whether the identification of the appellant was through recognition. In analysing the evidence of recognition, we shall be guided by the caution this Court expressed in the case of **WAMUNGA V R [1989] KLR 424**;

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction".***

From the testimonies reproduced herein we note that PW2 testified that she gave the identity of the appellant to PW4. However, PW4 did not state whether PW2 disclosed to her the identity of her defiler as the appellant.

It also seems to us that PW4 was comfortable in not knowing the identity of the defiler. This is apparent from her testimony that she was still not aware of the identity of the defiler two days after the sexual assault took place. In her testimony she stated that once PW2 fell sick, she took her to the hospital and it is thereafter that the purported identification parade was conducted by the village elder. This Court has previously dealt with cases where the evidence of identification or recognition was unsatisfactory. In **SIMIYU & ANOTHER V R [2005] 1 KLR 192 at 195** it stated;

> ***"If PW1 and PW3 recognized the appellants as their immediate neighbours then why did they not give their names to the police soon after the attack upon them? In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person or person to whom the description was given (See R– v- Kabogo s/o Wagunyu 23 (1) KLR 50). The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identity. The failure by the superior court to consider this aspect of the evidence shows that the superior court dealt with the evidence in a perfunctory manner. There was no exhaustive appraisal of the evidence tending to connect each appellant with the commission of the offences to see whether their respective convictions were safe…. Though the prosecution case against the appellants was presented as one of recognition or visual identification, it is manifest that the quality of identification by the witnesses was not good and gives rise to a danger of mistaken identification…. In the circumstances, we have no doubt that the appellants' convictions are both unsafe and unsatisfactory".***
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> (Our emphasis)

Similarly in **JAMES OMONDI ONYANGO V REPUBLIC [2014] eKLR** this Court posed a very pertinent question which is applicable in the instant appeal;

> ***"If indeed Otieno and Odongo had recognized the appellant at the scene as they alleged in their evidence, why was the name not given to the police when Otieno reported the matter the next morning?"***

We therefore pose the similar questions in this appeal, why did PW2 not identify the defiler to her mother immediately? We concede that due to her age, she may not have had the wisdom or maturity to do so. We pose the question regarding the mother; why did she not enquire further from the child of the identity of the defiler? And if she knew the identity but failed to testify to the same, why did she not reveal the identity of the defiler at the police station while she collected the P3 form in order for him to be arrested since he seems to be known to her as well? And why was there a need for the identification parade if PW2 had positively recognized the appellant?

There being no satisfactory answers to the foregoing questions, we find that the identification by recognition of the appellant was not free from the possibility error and therefore not safe. We can surmise without deciding that with the sole witness being of such tender age, the possibility cannot be ruled out of confusion or manipulation by outside forces. Whatever the case, she did not disclose the identity of the appellant beforehand. It is difficult for the Court to accept that the identification was free from error. With respect to the learned judge, we hold that he erred in not properly evaluating the evidence and hence arrived at an erroneous conclusion.

We cannot conclude this judgment without addressing the legality of the identification parade so-called conducted by the village elder. From the record, PW4 was confident about the identity of the appellant of the defiler on the basis that he was picked out four times by PW2 from amongst seven people. It is trite that identification parades are required to be done in accordance with the procedure set out in the Police Force Standing Orders which are under the **National Police Service Act** of **2011**.

First and foremost, the identification parade was not conducted in a police station or by police officers as should be the case. The minimum number of possible suspects per parade should not be less than 8. The regulations surrounding an identification parade are critical to the

investigative process with clear safeguards. They must be adhered to at all times because the court cannot countenance *ad hoc* entities purporting to perform duties that are the preserve of the police service to the detriment of an accused person. We fully associate ourselves with the holding in **DAVID MWITA WANJA & 2 OTHERS V REPUBLIC [2007] eKLR;**

> ***"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -***
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> > *'It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.'*
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> ***Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:***
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> ***"6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -***
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> **....**
>
> ***(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;***
>
> **....**
>
> ***(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"***

It is clear that the purported identification parade herein was unprocedural and unfair to the appellant. Even though the lower courts did not consider evidence therefrom as sole proof of the identity of the appellant, we found it meritorious to address it due to the magnitude of its implication on the innocence of the appellant. It lent to the appellant's identification an assurance it did not deserve. We find that the appellant who was not represented was prejudiced by such evidence. Without that evidence the prosecution case retained doubts and inconsistencies that ought to have been resolved in his favour.

We find that it was not enough for the courts to assert that the sham identification parade was of no consequence to the identification of the appellant. They ought to have gone further to conclude that its being held negated the assertions that PW2 positively recognized the appellant. She cannot have if she needed to pick him out at the alleged identification parade. It matters not how many times she purported to pick him out. The same was not safe and therefore the prosecution failed to prove its case beyond reasonable doubt.

For the reasons we have set out herein, we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 3rd day of July, 2019

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR